CITATION OILFIELD SUPPLY AND LEASING, LTD.
and
MURPHY OIL U.S.A., INC.
v.
ACTING BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-154-A, 92-160-A Decided January 28, 1993

Appeals from a determination that a tribal oil and gas lease had expired by its own terms because of failure to produce oil and/or gas in paying quantities.

Affirmed in part; referred for evidentiary hearing and recommended decision.

1. Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Expiration

A lease issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1988), does not expire because of a temporary shut-in caused by a mechanical breakdown or accident, as long as the shut-in does not continue beyond the time reasonably necessary to make repairs and resume production.

APPEARANCES: Ronald A. Hodge, its president, for Citation Oilfield Supply and Leasing, Ltd.; Michael E. Webster, Esq., Billings, Montana, for Murphy Oil U.S.A., Inc.; Marvin J. Sonosky, Esq., and James K. Kawahara, Esq., Washington, D.C., for the Assiniboine and Sioux Tribes of the Fort Peck Reservation.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Citation Oilfield Supply and Leasing, Ltd. (Citation) and Murphy Oil U.S.A., Inc. (Murphy) seek review of an April 8, 1992, decision of the Acting Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), finding that an oil and gas lease of tribal land within the Fort Peck Indian Reservation had expired by its own terms because of failure to produce oil and/or gas in paying quantities.

The Board affirms the Area Director's decision in part and refers this case for an evidentiary hearing in accordance with the discussion below.

Backround

The lease at issue is oil and gas lease 14-20-0256-3646, which was entered into on August 1, 1974, by the Assiniboine and Sioux Tribes of the Fort Peck Reservation (Tribes) as lessor and the Polumbus Corporation of Denver, Colorado, as lessee. The lease covers 160 acres of tribal land and was approved by the Acting Superintendent, Fort Peck Agency, BIA, on September 19, 1974. The lease term is "10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land."

Present assignees of the lease and their respective shares are: Citation, 25 percent; Murphy, 25 percent; Equity Oil Co., 25 percent; Tecovas Partners, L.P., 12.5 percent; Robert Venable, 6.25 percent, and Robert Venable, Trustee for AVR Trust, 6.25 percent. Citation received its interest by an assignment from Century Oil and Gas Corporation approved on March 4, 1987. Murphy received its interest by an assignment from Grace Petroleum Corporation approved on September 4, 1986.

A well, called the Tribal 4-10 well, was drilled in August 1984 and began producing prior to expiration of the primary term of the lease. Apparently, the well has produced without interruption until the events giving rise to this appeal. At the time of these events, Citation was the designated operator.

On August 31, 1991, a fire occurred in the treater for the well. 1/ The fire was extinguished by the City of Poplar Fire Department, with the assistance of BIA firefighters. A Citation employee orally reported the fire to the Fort Peck Agency on September 4, 1991. Citation did not report the fire to the Bureau of Land Management (BLM).

BIA agency staff inspected the well site weekly during the month of September 1991 and observed no attempt to repair the damaged treater or to put the well back into production. During one inspection, BIA learned that, on September 14, 1991, the Farmers Union Oil Company had removed its propane tank from the well site because of nonpayment of a delinquent bill. Removal of the propane tank rendered the well pump inoperable.

BLM inspected the well site on September 18, 1991, and reported to the Superintendent on September 24, 1991: "The status of the well was shut-in at the time of the inspection. There is evidence of a fire at the heater treater fire tube. It appears that no attempt has been made to repair the damage from the fire. An oil spray outside the treater fire wall stained an area approximately 20' x 20'."

As a result of its inspection, BLM issued a "Notice of Incidents of Noncompliance to Citation, ordering it to file a written report on the fire

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1/ A treater, or heater-treater, is a unit which separates salt water and other impurities from crude oil. It does so by heating the oil. See Williams and Meyers, Oil and Gas Terms "Heater-treater" (6th ed. 1984).

within 15 days. The BLM notice, dated September 20, 1991, indicated that Citation was in violation of NTL-3A, paragraph III.C. 2/ On September 25, 1991, Citation's president, Ronald A. Hodge, filed a report with BLM, stating: "There was a fire in the treater on 14 September 1991; the fire was caused by an oil leak in the firetube. Repair will be undertaken upon completion of bid estimates." 3/

On October 1, 1991, the Superintendent wrote to all lessees under lease 14-20-0256-3646, stating that the lease would be

> terminated effective thirty (30) days from the date of your receipt of this notice unless you can show just cause why we should not terminate the lease.
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> * * * * * *
>
> The violation, specifically, is that oil failed to be produced in paying quantities from said land thereby terminating the lease agreement. Lease Provision No. 6 [concerning cancellation and forfeiture] provides that you may request a hearing on this matter provided that you request such, in writing, within thirty (30) days from the date of your receipt of such notice.

By October 6, 1991, the well had been put back into production, apparently by Murphy. 4/

Citation requested a hearing pursuant to the Superintendent's October 1, 1991, decision. However, on October 11, 1991, the Superintendent withdrew his October 1 decision and issued a new decision, holding that, under Mobil Oil Corp. v. Albuquerque Area Director, 18 IBIA, 315,

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2/ NTL-3A is a Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases entitled "Reporting of Undesirable Events." Under paragraph III.C, Citation was required to report the fire within 15 days of its occurrence. See NTL-3A, 44 FR 2204 (Jan. 10, 1979).

3/ On Nov. 27, 1991, Hodge filed a final report on the treater fire. The report states in its entirety:

"Pursuant to NTL-3A, Part III(c):
"A. Fire occurrence: 31 August 1991 - County Fire Dept. responded
"B. Treater fire with damaged fire tube
"C. Resultant damage: damaged fire tube which was replaced
"D. Fire Dept. put out fire approximately one (1) hour afterwards; do not have fire report
"E. Gauge report attached: 18.52 barrels
"F. Subsequent Clean-Up: replaced fire tube; Richard's Roustabouts, Poplar, Montana
"G. Oil sprayed vegetation: cleaned up and debris removed from site
"H. Report filed pursuant to NTL-3A, paragraphs II & III(c)."

4/ According to the Area Director's decision, Murphy was still operating the well as of the date of that decision, i.e., Apr. 8, 1992.

97 I.D. 215 (1990), appellants' lease had expired by operation of law, making cancellation proceedings unnecessary.

The Superintendent's October 11, 1991, decision was appealed to the Area Director. 5/ On April 8, 1992, the Area Director affirmed the Superintendent's decision, rejecting an argument that Mobil was inapplicable and also rejecting an argument that shut-in of the well was justified under Duncan Oil, Inc. v. Acting Navajo Area Director, 20 IBIA 131 (1991). The Area Director stated:

> Although a temporary shut-in was justified due to the treater fire, the application of the Duncan decision is not appropriate because it is evident from the case file you were less than diligent in reporting the fire, repairing the treater and cleaning the site. Your report to BLM of the fire was clearly in response to their September 20, 1991, [notice], and the report contained erroneous data as to the date of the fire.
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> You state, "extensive personnel problems," attempts to comply with requirements of the Tribal Employment Rights Office (TERO), contributed to your failure to put the well back on production. You have not provided any documentation to demonstrate that TERO presented any undue delay in your operation of the tribal well. In fact, the superintendent's narrative of the issue states the agency contacted the TERO Program Director, who advises availability of qualified personnel was not a problem.

(Area Director's Decision at 3).

Citation and Murphy filed separate notices of appeal from the Area Director's decision. The appeals were consolidated upon docketing. Briefs were filed by Citation, Murphy, and the Tribes. The Tribes also filed a number of motions.

Tribes' Motion to Dismiss Murphy's Appeal

The Tribes moved to dismiss Murphy's appeal on the grounds that Murphy failed to appeal the Superintendent's decision to the Area Director. The Tribes contend that, by reason of 43 CFR 4.331, a party who does not appeal a Superintendent's decision is later precluded from pursuing the appeal to the Board.

Murphy contends that it did appeal the Superintendent's decision, pointing out that the notice of appeal to the Area Director begins: "CITATION OILFIELD SUPPLY AND LEASING, LTD. and MURPHY OIL USA, INC. hereby appeal * * *." Murphy also submits an affidavit from Hodge, in which he

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5/ The notice of appeal was signed by Hodge. The question of whether Murphy properly joined in the appeal is an issue now before the Board. See discussion infra.

states that he is a licensed attorney and that he signed the notice of appeal as an attorney representing both Citation and Murphy. The Tribes argue in response that Hodge signed the notice of appeal as president of Citation, not as an attorney.

While the notice of appeal to the Area Director is not a model of clarity as to Murphy, it does indicate at the outset that it is intended to be a notice of appeal from Murphy as well as Citation. The question of Hodge's intent and/or authority to represent Murphy was not raised while the appeal was pending before the Area Director, and the Area Director did not address the issue in her decision. 6/ In fact, it is not possible to tell from the Area Director's decision whether or not she considered Murphy to be an appellant.

43 CFR 4.331 provides:

> Any interested party affected by a final administrative action or decision of an official of the Bureau of Indian Affairs * * * may appeal to the Board of Indian Appeals, except--
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> (a) To the extent that decisions which are subject to appeal to a higher official with the Bureau of Indian Affairs must first be appealed to that official.

This provision might well preclude Murphy from appealing to the Board if it did not appeal to the Area Director. 7/ The provision would not, however, preclude Murphy from participating as an interested party in an appeal brought by Citation. The Board allows participation by all interested parties in appeals pending before it. See, e.g., 43 CFR 4.313. Accordingly, were the Board to dismiss Murphy's appeal, it would accept Murphy's briefs as those of an interested party in Citation's appeal.

Under the circumstances present here, where the question of Murphy's status as an appellant was present before but not resolved by the Area

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6/ Presumably the issue was not raised at the Area Director's level because the Tribes did not participate. It appears that the Tribes were not notified of the proceedings before the Area Director. The Superintendent's decision states that it was sent to "All Interested Parties" but does not identify those parties. Hodge did not serve the notice of appeal on the Tribes. There is no indication that the Area Director notified the Tribes of the appeal or required Hodge to serve them with the appeal documents.

As lessor, the Tribes are clearly an interested party in this matter.

7/ The Board does not, however, accept the Tribes' characterization of section 4.331 as precluding an appeal to the Board by any party who did not appeal a Superintendent's decision to the Area Director. There are clearly circumstances where such a party could appeal, the most obvious being the case where the Area Director reverses or substantially alters the Superintendent's decision.

Director, and where there will be little substantive effect here if Murphy's appeal is dismissed--Murphy's briefs will be considered in either case, and Murphy will be bound by the Board's decision in either case--the Board declines to dismiss Murphy's appeal. The Tribe's motion to dismiss Murphy's appeal is therefore denied.

Discussion and Conclusions

The lease at issue here is governed by the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. §§ 396a-396f (1988). In Mobil, supra, and Benson Montin-Greer Drilling Corp. v. Acting Albuquerque Area Director, 21 IBIA 88, 98 I.D. 419 (1991), aff'd, Benson-Montin-Greer Drilling Corp. v. Lujan, No. CIV-92-210SC-LFG (D.N.M. Jan. 13, 1993), the Board discussed the general principles governing determination of whether an oil and gas lease issued under IMLA has expired for failure to produce oil and/or gas in paying quantities. The basic rule is that an IMLA lease, if in its extended term, expires when production ceases.

The Board has recognized an exception to this basic rule. In Duncan, supra, the Board held that where an operator shuts in a well in the reasonable belief that a shut-in is necessary to avoid waste or damage to trust property, the lease does not expire. The holding in Duncan was based upon the lessee's obligation under the lease to have "due regard for the prevention of waste * * * and the preservation and conservation of the property."

Here, a shut-in of approximately one-month's duration was initiated by a treater fire. Murphy argues that this shut-in was justified under Duncan and paragraph 3(f) of appellants' lease which requires the lessee

> to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice having due regard for the prevention of waste of oil or gas developed on the land, * * * the preservation and conservation of the property for future production operations, and to the health and safety of workmen and employees; * * * Provided, That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond the lessee's control. [8/]

8/ 25 CFR 211.19 is essentially identical to paragraph 3(f) of appellants' lease. Section 211.19 provides in its entirety:

"The lessee shall exercise diligence in drilling and operating wells for oil and gas on the leased lands while such products can be secured in paying quantities; carry on all operations in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lessee to the productive sands or oil or gas-bearing strata to the destruction or injury of the oil or gas deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; plug securely all wells before abandoning the same and to shut off effectually all water from the oil or gas-bearing strata; not drill any well within

Murphy argues: "Here, the temporary interruption in production until necessary repairs could be completed protected the lessor's oil from being wasted while preserving and conserving the property for future productive operations, operations which were, in fact, resumed barely one month after the fire" (Murphy's opening Brief at 9).

The Board has not specifically addressed the question of whether a cessation of production in the circumstances present here may be considered an exception to the basic rule governing expiration of IMLA leases. The Area Director stated that a temporary shut-in was justified, thereby impliedly recognizing such an exception. In Benson-Montin-Greer, the Board observed that, under the body of law governing private oil and gas leasing, cessations of production due to mechanical breakdowns are construed as "temporary" cessations, which do not result in expiration of the lease. 21 IBIA at 102, 98 I.D. at 427. See also 3 Williams and Meyers, Oil and Gas Law § 604.4 (1992); Hemingway, Law of Oil and Gas, 291-304 (2d ed. 1983); 32 Rocky Mtn. Min. L. Inst. § 14.06 (1986). Under that body of law, in order for such a cessation of production to be deemed temporary, a lessee must make repairs and resume production within a reasonable time. See, e.g., Hemingway at 299: "[A] lease will not be treated as having terminated due to stoppages in production from breakdowns or for reworking operations. * * * However, such stoppage will only be tolerated for a reasonable period of time in relation to the facts and circumstances."

The Tribes, while contending that the period of nonproduction in this case was not reasonable, state:

> The Department's administrators are fully aware that shutdowns occur by reason of mechanical problems. If the Department terminated a trust lease every time a lease stopped producing, IBIA would be flooded with termination appeals. The fact is that upon experiencing a mechanical problem in a producing well, a competent operator immediately reports to BLM and moves promptly to repair the damage and return the well to production.

(Tribes' Brief at 18). The Tribes thus appear to agree with the Area Director that a shut-in of some duration could be excused as a result of the fire.

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fn. 8 (continued)
200 feet of any house or barn on the premises without the lessor's written consent approved by the superintendent; carry out at his expense all reasonable orders and requirements of the supervisor relative to prevention of waste, and preservation of the property and the health and safety of workmen; bury all pipelines crossing tillable lands below plow depth unless other arrangements therefor are made with the superintendent; pay the lessor all damages to crops, buildings, and other improvements of the lessor occasioned by the lessee's operation: Provided, That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond the lessee's control."

The Board has stated that the rules developed for non-Indian oil and gas leasing may not be applied mechanically to Indian oil and gas leases. Rather such rules may be applied only where they are not inconsistent with the statutes governing oil and gas leasing of Indian lands and the fiduciary duty of the Department to act in the best interest of the Indian landowners. Benson-Montin-Greer, 21 IBIA at 96, 98 I.D. at 424; Mobil, 18 IBIA at 323-31, 97 I.D. at 219-23.

[1] Guided by this standard, the Board concludes that there is no inherent incompatibility between the principles governing oil and gas leasing of Indian land and a practice which excuses a temporary shut-in, in the case of a mechanical breakdown or accident, to the extent reasonably necessary to make repairs. Further, such a practice is consistent with, and may be seen as authorized by 25 CFR 211.19 and paragraph 3(f) of appellants' leases. 9/ Therefore, the Board affirms the Area Director's conclusion that "a temporary shut-in was justified due to the treater fire."

9/ By contrast, the Board held in Mobil that the producer was not authorized to shut in wells because of marketing problems. The Board found that the regulations in Part 211, inter alia, precluded a suspension of operations based on marketing problems in the circumstances of that case. 18 IBIA at 328-29, 97 I.D. at 221-22.

A proposed revision of Part 211, published on Nov. 21, 1991, 56 FR 58734, contains a more explicit provision on suspensions of operations than appears in the present regulations. Proposed section 211.44 provides:

"(a) The Assistant Secretary [- Indian Affairs] may, under such terms and conditions as he/she may prescribe, authorize suspension of operations and production in the extended lease term whenever it is determined that remedial operations are necessary for continued production or for protection of the resource of [sic - probably should be "or"] the environment, provided that such remedial operations are conducted with reasonable diligence during the period of non-production according to the provisions in 43 CFR as applicable. * * *

"(b) An application for permission to suspend operations or production for economic or marketing reasons on a lease capable of production after the expiration of the primary term of the lease must be accompanied by the written consent of the Indian mineral owner and a written agreement executed by the parties setting forth the terms pertaining to the suspension of operations and production. Such application shall be treated as an amendment to the lease and shall be reviewed and approved by the Secretary as such."

56 FR at 58742.

The preamble to the proposed regulations states that

"[t]his provision would clarify the Department's position on suspension of operations. The Department believes that suspension of operations and production for remedial work on a well or mine to enhance or sustain [oil and (?)] gas production, to prevent damage to the mineral resource, or to prevent environmental damage is not only appropriate, but is also required as part of the lessee's implied covenants in the mineral lease. Failure to allow such suspensions without risk of lease termination would encourage irresponsible and possibly destructive behavior by lessees which are not

Although the parties appear to agree that some shut-in time was excusable here, they are squarely at odds as to whether appellants made repairs and resumed production in a reasonably diligent manner. Several problem swith Citation's post-fire performance were noted in the Area Director's decision and/or addressed by the parties here. While some of these problems are indirectly related to the issue here, they are not necessarily determinative of the issue. 10/ Citation's initial failure to report the fire to BLM, and its eventual reporting of incorrect information, are circumstantial evidence, perhaps, of Citation's lack of diligence in making repairs. However, the record contains no evidence concerning the amount of time that would reasonably be required to repair the treater. Nor is there any concrete evidence concerning the steps taken by appellants to repair it. 11/ There is conflicting evidence concerning whether or not any oil was pumped on September 5, 1991, and concerning the date the well was put back into production. 12/ The Board cannot tell from the present record

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fn. 9 (continued)
ultimately in the best interests of the Indian owner. However, the lessee must use reasonable diligence during the period of suspension and must comply with the BLM procedures in 43 CFR.

"Applications for suspensions for economic reasons would not be approved. However, the lessor and lessee may agree in writing to such a suspension which, if approved by the Secretary, would amend the lease and would not cause the termination of the lease."
56 FR at 58736.

10/ Other evidence is of questionable relevance. Citation argues that it had difficulty hiring a new pumper following the resignation of its contract pumper. If production was not possible because of an unrepaired treater, however, the lack of a pumper would not appear to be a critical matter.

11/ Even appellants' assertions in this regard are vague. Their statement of reasons (SOR) before the Area Director states only that, on Sept. 3, 1991, Citation "made arrangements to obtain bids for the treater repair" and that "[t]he treater parts were brought to the Reservation on 8 October 1991 and the treater was repaired"(SOR at 2, 3).

Citation's Sept. 25, 1991, report to BLM indicates that, as of that date, "bid estimates" had not yet been completed. Citation's Nov. 27, 1991, report to BLM indicates that Richard's Roustabouts of Poplar, Montana, replaced the fire tube. This is virtually the sum total of information about the repairs now in the record.

12/ Citation amended its initial reports to the Minerals Management Service and the Tribal Tax Office to show that 2 barrels rather than 0 barrels were produced in September 1991. Appellants allege that 2 barrels were pumped on Sept. 5, 1991, bypassing the damaged treater. The Tribes dispute that claim, submitting, inter alia, a statement from the pumper then employed by Citation that no oil was pumped through Sept. 6.

According to appellants' SOR before the Area Director, the well was put back into production either on Oct. 3, 1991 (SOR at 6) or Oct. 4, 1991 (SOR at 3). The SOR also stated, however, that the treater was not repaired until Oct. 8, 1991 (SOR at 6).

It is clear that at least one of the dates given in the SOR must be incorrect.

whether, under the circumstances of this case, production was resumed within a reasonable period of time. The Board finds that this appeal cannot be resolved on the record as presently constituted and that there are genuine issues of material fact in controversy.

Order of Referral for Evidentiary Hearing

Therefore, pursuant to 43 CFR 4.337(a), the Board refers this matter to the Hearings Division of this Office for an evidentiary hearing and recommended decision by an Administrative Law Judge. The Administrative Law Judge shall take evidence and issue a recommended decision, in accordance with 43 CFR 4.338, on the questions of (1) the number of days the Tribal 4-10 well was shut in and (2) whether appellants repaired the treater and resumed production within a reasonable period of time. In accordance with 43 CFR 4.339, any party may file exceptions or other comments with the Board within 30 days from receipt of the recommended decision. The Board will then inform the parties of any further procedures in the appeal or issue a final decision. 13/

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Anita Vogt
Administrative Judge

I concur:

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Kathryn A. Lynn
Chief Administrative Judge

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13/ The Tribes' motion for an evidentiary hearing is granted. Arrangements for discovery, as also requested by the Tribes, should be made with the Administrative Law Judge. The Tribes' remaining motions, to the extent not previously acted upon, are denied.